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THE FUNCTION OF PLEADING IN A GOVERNMENT OF PROTECTION.

The Central Law Journal made some criticisms of the Chicago Municipal Court Act, relating to its procedure which appears to have been drafted by intellects who had nothing more in view than "justice between the parties" and what was "in furtherance of justice between them." This view was thought a narrow and mischievous view which would lead to disappointment. For our expressions the National Corporation Reporter called us to an accounting. Thereupon we asked this able and esteemed contemporary certain questions as to the uses and necessity of pleading in the due administration of the laws. On September 17th, ult., the Reporter proceeded to answer, not, however, without some forgetfulness and possibly a little facetiæ.

From the Reporter's response to our questions we are put to a disadvantage for the reason that its position is ambiguous and equivocal; for the question is, *can pleadings be dispensed with in a government of protection?* In other words, *are not pleadings a necessity in the due administration of justice? Are they not imperatively demanded for the public welfare from necessity, convenience, certainty and the economies of the judicial department?* To meet these views the Reporter defines pleadings as designed to serve only one purpose, and this is, namely: *"To apprise the adverse party of what he must meet."* Beyond this the Reporter expressly and approvingly quotes a code provision which provides that a cause is commenced by *filing* the statement of a *cause of action.* It also emphasizes its approval of equity requirements for the constitution and operation of a record. Next the Reporter commits itself to the view that pleadings may be dispensed with in all courts, as they are in justices' courts. No doubt it is meant if the court is organized as justices' courts are.

Now we wish to demur to the Reporter's views as to the function of pleadings being limited to apprise the respondent of what he must meet. We offer the view that appellate courts have a use for pleadings where they come to review a cause; also that pleadings are needed to resist objections upon collateral attack; also to show what subject-matter was litigated or what issues were decided in subsequent litigation between the parties; also to satisfy requirements of due process of law; also to enable the removal of *causes* from one court to another, as from state to federal courts; also for the operation of what is called the comity of courts; also for justification defenses of officers; also for the exercise of election of remedies; also for purposes of public policy; also for the operation of what is called constructive notice. And still there are other reasons. In perjury suits the materiality of the issue is sought. Now, where can or shall we look for this except in the pleadings? Views from either *res adjudicata* or constructive notice will show the position of the Central Law Journal on the one hand, and of the Reporter on the other.

The early Illinois authorities clearly stated the purpose of pleadings. In Shinn's Pleading, Vol. I., Sec. 478, the author declares the position of the Illinois courts on the object of pleading, to-wit: "The office of the declaration is to exhibit *upon the record* the ground of the plaintiff's cause of action, and the nature of this cause can only be determined by reference to the substance of the declaration." One of the established rules of law is to the effect that no valid judgment can be entered in an action without the filing of a declaration or complaint, or some written statement of plaintiff's *cause of action,* and demands. 23 Cyc. p. 695, citing authorities. In the case of Grimison v. Russell, 11 Nebr. 469, 9 N.

W. 647, it appeared that subsequent to trial, and while the case was under advisement by the court, all the pleadings were lost. It was held, on objection by defendant, that judgment could not be entered without substituted copies. If the only office of pleading is to "merely advise the adversary party of the state of facts which he will have to meet," why was it necessary after trial, and the evidence all in, to substitute a few lost pleadings before the court who had the case under advisement, could deliver itself of the judgment in the case? These reasons, so often departed from in these days by superficial judges and lawyers, are well stated by the court, and we have epitomized them in the fourth paragraph of this editorial.

Mr. W. T. Hughes, in his work on Grounds and Rudiments of Law, Section III, defines pleadings as the "juridical means of investing a court with jurisdiction of a subject matter to adjudicate it." The pleadings with the judgment are the solemn record in a cause which lose none of their importance even after the case is heard and determined. Such a record may affect personal or property rights of generations yet unborn, and no government guaranteeing protection to property or personal rights by "due process of law" could dispense with pleadings any more than they could dispense with courts of justice.

NOTES OF IMPORTANT DECISIONS

EVIDENCE—ADMISSIBILITY OF INTRODUCING IN EVIDENCE IN PROOF OF SEDUCTION THE CHILD BORN OF THE MERETRICIOUS UNION.—One of the disputed questions of the law of evidence is the admissibility of putting in evidence to prove seduction the child born of the unlawful intercourse between the parties to the litigation. The preponderance of recent authorities is in favor of the admissibility of such evidence. This is the decision of the Supreme Court of Oregon in the case of Anderson v. Aupperle, 95 Pac. 330, where during the course of the trial, and while Viletha Thurman, the granddaughter of the plaintiff, was upon the witness stand in plaintiff's behalf, she was requested to bring forward the baby to which she had testified she had given birth, and of which the defendant was the father. The child, being then a little under three months of age, was offered and received in evidence for the inspection of the jury, over the objections of the defendant. It was strongly urged by defendant's counsel that it was error to expose, as an exhibit before the jury, a child less than three months of age for the alleged purpose of proving a resemblance to the defendant. The argument was that, "although a resemblance between the parties, properly proved, is some evidence upon the issue, but during the first few weeks or even months of a child's existence it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period" (Clark v. Bradstreet, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221), and that such evidence, when deduced from the exhibit of an immature child, "is too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury." Hanawalt v. State, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588.

There is a decided conflict of authorities upon the admissibility of such evidence, the adjudications ranging from a total exclusion thereof to an unqualified admission. The most able of the recent authorities is the opinion of Mr. Chief Justice Parsons in the case of State v. Danforth, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600, decided in 1905. After reviewing most of the cases on this point he says, at page 219 of 73 N. H., page 841 of 60 Atl. (111 Am. St. Rep. 600), of the opinion: "All the authorities concede, in effect, that there may be cases in which the maturity of the child, or the character of the peculiarities relied upon as a ground of resemblance or dissimilarity, render the child competent evidence on the issue of paternity. The objections urged to the competency of the evidence go rather to its weight than to its relevancy. When comparison is made to determine a difference of race or otherwise, greater weight may properly be given to the evidence, but the ground of its relevancy is the same as when the comparison is between individuals. The objection resting upon the immaturity of the child is merely to the definiteness of the proof. If all individuals developed by a fixed rule, it might be possible to fix upon a certain age below which the child should not be exhibited as evidence on this issue. If there were such an age, its scientific determination would involve the finding of a question of fact upon physiological evidence—

an investigation which this court has no means or power to make. Whether the features of a child are sufficiently developed to authorize its use as evidence by comparison with the alleged parent is purely a question of fact. A court of law cannot determine this question of fact as a rule of law without evidence, upon their personal impressions, without basing their judgment upon a 'vague, uncertain, and fanciful' foundation. Conceding that resemblance properly proved is an evidentiary fact competent for consideration in connection with other evidence upon the issue of paternity, and that in certain instances or situations the individuals themselves may furnish evidence of such resemblance, the question whether the evidence offered by one of the individuals—the child—is sufficiently definite to have weight on the question in a particular case is a question of remoteness determinable at the trial term. Pritchard v. Austin, 69 N. H. 367, 369, 46 Atl. 188; Morrill v. Town of Warner, 66 N. H. 572, 29 Atl. 412."

THE LAW IN ITS RELATION TO THE CHILD.

In everything that relates to the condition of infancy, or nonage, the common law affords a rare instance of complete harmony between legal doctrine and moral conceptions of right and justice. In no other class of cases is the determination so clearly referable to plain and fundamental principles, adherence to which will insure results in accordance with the real merits of the cause, as in those involving the care and guardianship of the person of infants. In an early case, that great oracle of the law, Lord Mansfield, laid down the doctrine, that when a child is brought up by *habeas corpus,* the court, in disposing of its custody, must judge in every instance "upon the circumstances of the particular case and give its directions accordingly."[1] This doctrine embraces the accepted principle of decision in the American cases. There is, there can be, no other "rule." Yet the courts have not always recognized this. Later English judges, departing from the principle of their great predecessor, formulated a system of rules under which they held themselves bound to dispose of the fate of children brought before them with a rigid adherence to supposed technical requirements that signally defeated the ends of justice. Starting with the postulate that the custody of the child "belonged" to the father or other legal guardian and could not be taken from him unless "forfeited" by the grossest misconduct,[2] they rendered a series of decisions under which helpless infants were torn from the mothers' arms and delivered into the possession of dissolute men with the judicial calm and impartiality that would govern the transfer of a bale of cotton or a load of grain to the rightful owner suing in replevin.[3] The law as thus declared and applied so shocked the moral sense of the people of England that it led to the passage of various statutes by Parliament, designed to remedy the supposed defective condition of the common law. At the present day the English judges are guided by broad, humane and just views in the determination of questions relating to the care and guardianship of infants.[4] The comment of an American judge upon the legislation deemed necessary in England in order to enable the courts to decide justly and rightly is, that Parliament did little more than restore the law to its former proper footing.[5]

There are some early American cases in which the harsh doctrine of the now discredited English cases above referred to was followed.[6] On the other hand, there is an array of decisions by our highest American courts, based on the common law, that may be regarded as absolutely settling the law on this subject in accordance with

(1) Rex v. Delaval, 3 Burr. 1434.

(2) Reg. v. Clark, 7 E. & B. 186; Re Hakewill, 12 C. B. 223.

(3) Rex v. DeManneville, 5 E. 221; Exp. Skinner, 9 J. B. Moore, 278; Exp. McClellan, 1 Dowl. P. C. 81; Rex v. Greenhill, 4 Ad. & El. 624, 6 Nev. & M. 344.

(4) Smart v. Smart, 1892, App. Cas. 425; Reg. v. Gyngall, 1893, 2 Q. B. 232; Re A. & B., 1897, 1 Ch. 786.

(5) Gishwiler v. Dodez, 4 O. St. 615, 622.

(6) Re Kottman, 2 Hill (S. C.), 363; Exp. Williams, 11 Rich. (S.C.), 452; Hutson v. Townsend, 6 Rich. Eq. (S. C.), 249; Tarkington v. State, 1 Ind. 171; Moore v. Christian, 56 Miss. 408; Re Vetterlein, 14 R. I. 378.

the ruling of Lord Mansfield. There is no danger at this day that our judges would feel themselves constrained to do things of which, according to language credited to Chief Justice Denman, they could feel "ashamed."[7] There could no longer be such a travesty of justice as a solemn judicial decree requiring an infant to be torn from the mother's arms and delivered into the possession of an outcast and his avowed mistress. Yet there is not wanting even at this late day judicial recognition of the legal *theory* that rendered such things possible and aroused the horror of a nation at the supposed barbarity of the law. It has been gravely stated that the law in cases affecting alleged claims to the person of children is "inexorable" and that the courts must decide according to certain general rules, "though the result be contrary to what they may consider as the real merits of the particular cause."[8] Apart from any other consideration, the fact that such a dictum can come from so high a source as that here referred to would seem amply to justify a restatement of the rule laid down by the great English judge in collocation with the underlying principles governing the law of infancy and guardianship from which it is logically deduced. A great wave of fervid interest on the subject of the duty of society and the state to the child has of late years swept over the nation, quickening the public conscience and rendering the discussion of the topic in all its aspects one of universal, living concern.

The doctrine first concisely stated by Lord Mansfield has been otherwise expressed to the effect, that in matters affecting the determination of questions relating to the custody of infants there can be no legal standard by which the courts must be governed; the custody cannot be awarded according to any fixed and inflexible rules, as in cases where property rights are concerned.[9] From the very nature of the questions involved, the judgment must be essentially a discretionary judgment, one absolutely incapable of being brought under legal rules and definitions.[10] This does not mean, that in these cases the courts are cast upon a sea of doubt, without chart or compass. Great as is the variety of questions here arising, they are all susceptible of solution by reference to certain fundamental doctrines extending through the entire law and comprehending every proposition on the subject.[11]

At the foundation of the whole law in this regard lies the common-law conception of the legal status of the child. Under the ancient Roman law the family was regarded as the legal unit of society. The identity of the child was merged in that of the family and the control of the father (*patria potestas*) was closely assimilated to that of master over slave.[12] Our law, the product of an essentially different system of government and civilization from that of Rome, in times of paganism, deals with the individual as the unit of society. The doctrine of the common law is, that from the very moment of birth a child becomes a citizen, or subject, of the government under whose jurisdiction born, entitled to the protection of that government.[13] In the case of adults, or persons who have attained the full age of legal capacity, the exercise of this protection is of comparatively limited scope, being largely restricted to redress of actual injuries to the citizen in violation of his legal rights. In the case of infants, or persons under the natural and legal disability of nonage, the government exercises functions of guardianship and superintendence flowing from its general power and duty as *parens patriae*, or sovereign guardian. No doctrine has been asserted more broadly in principle than that of the authority of government in this regard and none has received more extensive and varied practical application. The numerous regulations to be found upon the statute books of the states, designed for the protection of the morals and health of minors and the secur-

(7) Gishwiler v. Dodez, supra.
(8) Newsome v. Bunch, 144 N. C. 15.
(9) Re Blackburn, 41 Mo. App. 622, 628.
(10) Smart v. Smart, supra.
(11) Cf. Bishop Non-Contr. L., §§ 48, 53.
(12) 8 Harv. L. Rev. 39.
(13) Re Moore, 11 Ir. C. L. N. S. 1, 14; Re Connor, 16 Ib. 112, 124; McKercher v. Green, 13 Col. App. 270.

ity of their person, have been sustained as valid enactments in the exercise of this governmental power. Such are provisions prohibiting the sale of liquor to minors, with or without the parental consent;[14] those regulating the kinds of employment[15] and hours of labor[16] of minors; those prohibiting their admission to certain places, *e. g.*, drinking saloons.[17] So also, it is held, that statutes may authorize the detention of minors duly convicted of crime in special juvenile prisons or reformatories[18] and that, whenever such course is necessary for their moral and future welfare, the commitment of minors to houses of refuge and other juvenile asylums and institutions may be authorized by summary proceeding.[19] The validity of such legislation is now universally upheld. The reasoning adopted in the cases on this subject has been followed in another line of decisions in which the validity of recent statutes establishing juvenile courts for the trial and commitment of juvenile delinquents and dependent children is fully sustained.[20] In the case of the commitment of minors to juvenile institutions upon summary process, without the ordinary forms of accusation and trial, it is held that no right of the child is violated, the object of the proceeding being, not punishment, but care and guardianship. Rights of third persons—parents, guardians—cannot be said to be violated, because the fundamental idea upon which the entire legal conception of guardianship rests is, that it is a mere agency or instrumentality of government for the purpose of according to infants the protection of its laws. The legal status of every guardian, natural as well as specially appointed, is that of a trustee.[21] No such thing as a "vested right" is recognized in this connection.[22]

It has accordingly, from the earliest times, been held, that the chancery courts may exercise a general care and wardship over infants and regulate the conduct of all guardians, however created or appointed, removing or superseding them, if deemed proper, and holding them fully accountable as trustees.[23] The jurisdiction in such cases is plenary and far-reaching. The infant on whose behalf in any form of proceeding the aid of chancery is invoked becomes, by the very fact of the application or pendency of the proceeding, until the attainment of full age, a ward of the court and may be governed and protected accordingly, and no act can be done affecting the person or property of such infant except under the express or implied direction of the court itself. In the adjudication of the matter of custody, the courts of equity take into consideration all the circumstances and render their decision on principles of justice and natural equity.[24] From the peculiar constitution of these courts the jurisdiction exercised by them in relation to infants naturally differs from that exercised by courts of law in the particular of its much broader scope. Here, however, the difference ends. The distinction between the remedy by bill or petition in equity and the proceeding by *habeas corpus* in cases affecting infants is solely a matter of form and procedure.

The principles that underlie the action of the two classes of tribunals in these cases are the same. Under an extension of the strict scope of the remedy by *habeas corpus*, the common-law courts exercise jurisdiction in the case of infants held in private custody

(14) State v. Clottu, 33 Ind. 409; State v. Lawrence, 97 N. C. 492.

(15) People v. Ewer, 141 N. Y. 129; Re Weber, 149 Cal. 392; re Spencer, Ib. 396.

(16) State v. Shorey, 48 Or. 396.

(17) People v. Japinga, 115 Mich. 222.

(18) State v. Phillips, 73 Minn. 77.

(19) Exp. Crouse, 4 Whart. 9; Wisconsin School v. Clark County, 103 Wis. 651; State v. Home Society, 10 N. Dak. 493; House of Refuge v. Ryan, 37 O. St. 197; Exp. Nicolls, 110 Cal. 651; Jarrard v. State, 116 Ind. 98; McLean v. Humphreys, 104 Ill. 378.

(20) Hunt v. Circuit Judges, 142 Mich. 93; Mill v. Brown, 31 Utah, 473; Re Christensen (Utah), 62 Cent. L. J. 219; Robison v. Circuit Judges, 151 Mich. 325.

(21) Wellesley v. Wellesley, 2 Bligh N. S. 124. 128; Striplin v. Ware, 36 Ala. 87; Shine v. Brown, 20 Ga. 375.

(22) U. S. v. Green, 3 Mason, 482, Fed. Cas. 15,256; Nugent v. Powell, 4 Wyom. 173.

(23) Cowls v. Cowls, 8 Ill. 435; North Pacific Board v. Ah Won, 14 Or. 339; State v. Grisby, 48 Ark. 406; Re Knowack, 158 N. Y. 482; Re Stittgen, 110 Wis. 625; Jenkins v. Whyte, 62 Md. 427, 432; Norris v. Baumgardner, 97 Ib. 534; Richards v. Railway Co., 106 Ga. 614.

(24) Cowls v. Cowls, supra.

or restraint.[25] The writ is the means of bringing the infant before the court, the powers of the court in its subsequent proceedings being referable to the general jurisdiction over infants.[26] As in equity, so at law, the government acts through the remedy invoked as *parens patriae*. It has accordingly been held throughout the United States, that when infants are brought up by *habeas corpus*, the decision must be upon the merits of the particular cause and that the welfare of the infant is the paramount consideration in each case to which all other considerations must yield.[27] While, in a general sense, the custody of the parent or guardian is ordinarily deemed the proper one, yet this must never be asserted as a legal right or claim, the only strict right or claim recognized in these cases being that of the child to be in that custody or charge which will subserve its real interests.[28] So firmly is this principle established that even where there is a statutory provision, that the parents, if not unfit, shall be *entitled* to the custody, it is yet held, that the courts, taking the statute as a general guide, must look to the circumstances of each particular case and give special attention to the best interests of the child.[29] As wardship must never be converted into virtual imprisonment, the further doctrine obtains, that the court, guarding only against an injurious custody, will consult and respect the child's own wishes as to its proper disposal, if it is capable of making the choice for itself. This capacity, according to the best considered cases, is to be ascertained, not by reference to any particular age, but by the child's actual intelligence and judgment.[30]

The power of the courts in all these cases is a fully discretionary one to do what the welfare of the child requires to be done—a power to be freely and liberally exercised, so as to promote the real objects of the law, without regard to ordinary technicalities of procedure.[31] Such is the well-established law, resting not in mere theory, but guiding and controlling the actual practice and judgments of our courts. Hence, it is the constant practice of the courts both of law and equity to ignore any supposed superior claims arising out of mere guardianship. As between parents, the custody of younger children and female children of all ages is ordinarily confided to the mother.[32] In cases of very young children this may be done even though she is immoral and a decree has been passed against her for adultery.[33] Children of a near age are ordinarily kept together.[34] On *habeas corpus* as well as in equity, the courts may not only refuse to restore the custody to the legal guardian, when he is out of possession, but may remove the child when produced in his possession.[35] It is not at all necessary that the actual "unfitness" of the parent or other legal guardian should appear, in order to warrant a refusal to give the child into his custody. It is now well settled, that when a child has for any length of time been in

(25) Wilmot's Notes, 92-93; Re Barry, 42 Fed. R. 113, 136 U. S. 537.

(26) Re Barry, supra; New York Foundling Hosp. v. Gatti, 203 U. S. 429.

(27) Mercein v. People, 25 Wend. 64; Merritt v. Swimley, 82 Va. 433; Anderson v. Young, 54 S. C. 388; Gishwiler v. Dodez, supra; Corrie v. Corrie, 42 Mich. 509; Bullock v. Robertson, 160 Ind. 521; McKercher v. Green, supra; Stickel v. Stickel, 18 App. D. C. 149; Coulter v. Syphert, 78 Ark. 193; New York Foundling Hosp. v. Norton, 9 Ariz. 105; State v. Poindexter, 45 Wash. 37.

(28) Wadleigh v. Newhall, 136 Fed. 941; Nugent v. Powell, supra; Tytler v. Tytler, 15 Wyom. 319.

(29) Sturtevant v. State, 15 Neb. 459, 463; Jones v. Darnall, 103 Ind. 569; Bryan v. Lyon, 104 Ib. 227; Sheers v. Stein, 75 Wis. 44, 51; Lally v. FitzHenry, 85 Iowa, 49; State v. Greenwood, 84 Minn. 203; Tytler v. Tytler, supra.

(30) Re Lyons, 22 L. T. N. S. 770; State v. Bratton, 15 Am. L. Reg. N. S. 359, 363; Woodruff v. Conley, 50 Ala. 304; Roberts v. Walker, 18 Ga. 5; Maples v. Maples, 49 Miss. 393; Tytler v. Tytler, supra.

(31) Gishwiler v. Dodez, supra; Corrie v. Corrie, supra; Cowls v. Cowls, supra; Dumain v. Gwynne, 10 Allen, 270; State v. Poindexter, supra.

(32) Hawkins v. Hawkins, 65 Md. 104, 112; Re Delano, 37 Mo. App. 185; People v. Hickey, 86 Ill. App. 220.

(33) Comm. v. Addicks, 5 Binney, 520; Dailey v. Dailey, Wright (Ohio), 514; Haskell v. Haskell, 152 Mass. 16.

(34) Comm. v. Addicks, 2 S. & R. 174; English v. English, 32 N. J. Eq. 738; Lusk v. Lusk, 28 Mo. 91; Tytler v. Tytler, supra.

(35) State v. King, 1 Ga. Dec. 93; Re Hansen, 1 Edm. Sel. Cas. 9.

the custody of a stranger or third person, the courts will not make a change, unless it clearly appears, that the interests and welfare of the child necessitate such change.[36] In addition to the interests of the child itself, due consideration is always given to the person with whom the child may have been placed,[37] so that, even where a child is too young or has been in its adoptive home too short a while to be itself affected in feeling by a separation, the feelings and interests of the person who has undertaken its care must not be disregarded.[38] *A fortiori,* in a case where through the act or sufferance of the strict legal custodian the custody has come to be in a third party, the courts will not, at the instance of a parent or guardian, interpose to restore it to him, thus breaking up ties that the child was allowed to form, if the change appears actually disadvantageous.[39] The policy of the law indeed favors the placing of children in suitable homes among strangers, whenever the natural guardians are unable or unwilling properly to care for them. Upon this ground it is now held, that contracts to adopt children, or to leave them a legacy in consideration of the relinquishment of their custody to the promisor, may be enforced both at law and in equity.[40]

The principles underlying the decision in the class of cases above referred to, directly involving questions of the custody and care of the person, are of general application in the determination of controversies or proceedings affecting the interests of infants. Whether the guardianship is directly involved or not, the judgment must be in harmony with these principles. Thus, while it is a doctrine of the strict common law, that the father is entitled to the services and earnings of his minor child, yet if he fails in his paternal duty of maintenance and care, this is deemed a relinquishment of any such claim.[41] So it is uniformly held, that a father in insolvent circumstances, while continuing in the fulfillment of all the duties of the paternal relation, may yet voluntarily relinquish the claim to the child's earnings in order to prevent his creditors from levying upon the fruits of the child's industry.[42] It is also held, that while a father may, at common law, bind out his infant son for the purpose of learning some useful trade or employment, he cannot bind him as a mere servant, nor can he assign the child's services for a consideration to enure to himself.[43]

The solicitude of the law in guarding and protecting the interests of children appears in the most various directions. It extends, among other things, to the prohibition and prevention of acts and contrivances to place children beyond the reach of legal remedies. The writ of injunction is applicable to prevent any person out of possession, though he be the parent or other legal custodian, from possessing himself of the person of a child by means of force or violence, or other indirect or illegal means.[44] The use of force or violence in such cases may likewise be remedied as a civil trespass,[45] or punished criminally.[46] Courts have also in some instances restored children to persons from whom they had been removed by means of stratagem or violence, in order that no undue advantage might be

(36) Chapsky v. Wood, 26 Kans. 650; People v. Porter, 23 Ill. App. 196; Stringfellow v. Sommerville, 95 Va. 701; Anderson v. Young, supra.

(37) Re Murphy, 12 How. Pr. 513.

(38) Green v. Campbell, 35 W. Va. 698.

(39) U. S. v. Sauvage, 91 Fed. R. 490; Legate v. Legate, 87 Tex. 248; Merritt v. Swimley, supra; Sheers v. Stein, supra; Re Gates, 95 Cal. 461; Spears v. Snell, 74 N. C. 210.

(40) Godine v. Kidd, 64 Hun, 585; Winne v. Winne, 166 N. Y. 263; Enders v. Enders, 164 Pa. St. 266; Healey v. Simpson, 113 Mo. 340.

(41) The Etna, 1 Ware, 462, Fed. Cas. 4,542; Thompson v. Railway, 104 Fed. R. 845; Canovar v. Cooper, 3 Barb. 115; McCarthy v. Railroad, 148 Mass. 550; Nugent v. Powell, supra.

(42) McDaniel v. Parrish, 4 App. D. C. 213; Dierker v. Hess, 54 Mo. 246; Atwood v. Holcomb, 39 Conn. 270; Trapnell v. Conklyn, 37 W. Va. 242, 254; Flynn v. Baisley, 35 Or. 268; Bristor v. Railway Co., 128 Iowa, 479.

(43) Resp v. Keppele, 2 Dall. 197; Nickerson v. Easton, 12 Pick. 110.

(44) Re Lyons, supra; Armitage v. Hoyle, 2 How. Pr. N. S. 438; Ellis v. Jessup, 11 Bush (Ky.), 403.

(45) DeManneville v. DeManneville, 10 Ves. 52, 62.

(46) Comm. v. Coffey, 121 Mass. 66; State v. Farrar, 41 N. H. 53; State v. Rhoades, 29 Wash. 61; Re Peck, 66 Kan. 692.

taken in this manner.[47] In accordance with the same policy, the courts refuse to entertain actions to recover damages for the mere possession or taking away of a child from the parent or guardian.[48] While an action, nominally for loss of services, may in some instances be maintained, this is a remedy of limited scope,[49] properly designed to afford redress where the gist of complaint is of an actual wrong or injury to the child. Even in cases where third parties, without direct warrant of law or express authority, have procured children to leave parents or guardians, there is no liability to a suit, if the action was prompted by humane or otherwise innocent motives.[50]

Such in outline is the policy of the common law in relation to the child, a policy founded essentially in ethical conceptions of right and justice. This policy has indeed not always been maintained in the actual judicial administration of justice. Harsh sacrifices of the best interests of children have at times been made by courts and judges in obedience to the supposed demands of a fancied "inexorable law" that they felt bound to administer. Yet it is now established to the point of demonstration, that this wresting of judgment was due to "judicial misconception," leading the courts in reality to violate the law they seemed to serve. This discarded error has borne its full fruit of evil and should not be resurrected. No judge administering the common law need ever feel himself constrained to render a judgment affecting the interests of a child which as a man he must deplore. Without anxious misgiving that any legal rule will be infringed, courts may in all such cases follow the highest dictates of humanity and yield to the full demands of actual justice—for upon these the whole law in this regard is firmly based.

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(47) Rex v. Mosely, 5 E. 224, n.; Comm. v. Fee, 6 S. & R. 255; Janes v. Cleghorn, 54 Ga. 9.

(48) Dowling v. Todd, 26 Mo. 267; Rising v. Dodge, 2 Duer, 42, 48.

(49) Kenney v. Railroad, 101 Md. 490.

(50) Nash v. Douglass, 12 Abb. Pr. N. S. 187; Baumgartner v. Eigenbrot, 100 Md. 508. Cf. Reg. v. Tinkler, 1 F. & F. 513.

INJUNCTION — TO PREVENT INTERFERENCE WITH RIGHT TO HUNT OR FISH.

AINSWORTH v. MUNOSKONG HUNTING & FISHING CLUB.

Supreme Court of Michigan, June 27, 1908.

Complainants' right to hunt ducks on the navigable waters of the state is not a bare legal right, interference with which causes no substantial injury, but is a right of sufficient dignity to move a court of equity to protect it by injunction.

McALVAY, J.: Complainants, residents of the county of Chippewa, filed their bill of complaint against defendant, praying that defendant be enjoined from interfering with, preventing, and molesting complainants in the pursuit of their common right to hunt wild fowl on Munoskong Bay in said county, whose waters, as is claimed in said bill, are a part of the Great Lakes; the defendant claiming to have exclusive right to take such wild fowl.

The material matters set forth in the bill of complaint necessary to state are: That the waters referred to are navigable meandered waters; that they were hunting ducks on said waters in a rowboat about one-half mile from shore, and had set their decoys for that purpose; that the agents and servants of defendant corporation came from the club-house and ordered complainants to cease hunting ducks, claiming the exclusive right to hunt ducks on said waters to be in defendant, and that complainants had no right or privilege to do so; that the agents and servants of defendant willfully and with intent to prevent complainants from hunting ducks upon these waters rowed their boat about among the decoys and prevented ducks from alighting near them, and prevented complainants from shooting and securing them; that complainants moved their decoys from that place to another upon the navigable waters of this bay, where they might lawfully hunt ducks; that these parties followed them, repeating their unlawful conduct and, acting under orders of defendant, again prevented complainants from hunting; that they followed complainants about with their boat, and finally they were unlawfully compelled to cease from exercising their lawful right to hunt on this navigable meandered bay; that defendant's servants, when requested to keep away and desist from interfering with them, refused, and said they were gamekeepers of defendant, which had employed and placed them there to prevent any persons except members of the club from hunting on said waters, which right was possessed solely and exclu-

sively by defendant—which conduct complainants allege is in violation of their inalienable rights in the pursuit of happiness and also of their personal liberty. Complainants allege that defendant club owns certain land on the border of this bay, upon which land is a clubhouse where these gamekeepers remain for the purpose of keeping hunters from these waters, and that defendant claims that by reason of such ownership it has the exclusive right to hunt on said waters; that defendant through its members, has publicly stated and advertised the fact that they will prohibit and prevent all persons, including complainants, at all times from hunting upon these waters.

The bill avers: That this bay is navigable by large steam and sail craft; that the ownership of defendant extends only to high or low water mark, at which point the fee of the State of Michigan begins; that they have a right at all times when the law so allows to hunt upon said waters in common with all citizens of the state; and that the lands covered by the waters of said bay beyond the meandered line thereof are unsurveyed, and none of them are owned or possessed by defendant, but belong in fee to the State of Michigan, held by the state as trustee for all of the people of the state, and complainants have as much right to hunt upon these waters as the members of defendant club. The bill also states that complainants desire and intend to hunt on said bay during the then approaching open season of 1907, but will be prevented from doing so by defendant's servants and agents, unless they are enjoined from interfering with them to the irreparable loss and injury of each of them, all of which is alleged to be contrary to equity and the rights of complainants and to their manifest wrong and injury. The bill alleges jurisdiction, and contains all the usual and necessary formal parts of a bill in chancery, and prays that defendant and its members, agents, etc., be restrained and enjoined from interfering with, obstructing, and preventing, in any manner, complainants from the free exercise of their right to hunt wild fowl upon said waters.

A preliminary injunction issued upon filing the usual bond in the sum of $500. A motion for dissolution of this injunction was denied. Defendants then demurred to the bill of complaint upon the following grounds: "(1), Complainants have not, in and by their said bill, made or stated such a cause as entitled them in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill or in any of such matters. (2), It appears by the said bill of complaint that, if complainants have any cause of action relative to the matters set forth in said bill of complaint, they have an adequate remedy at law. (3), It appears by said bill of complaint that the rights affected of complainants, if any, are to their persons and not to their property. (4), That said bill of complaint fails to show any immediate danger of ireparable damage. (5), That complainants have been guilty of such laches that they are now barred and estopped from asking relief. (6), That complainants seek to restrain others from doing acts and things they have a legal right to do. (7), That the allegations in said bill of complaint are insufficient to give the court jurisdiction to grant the relief prayed for." Upon a hearing a decree was granted sustaining the demurrer and dismissing the bill of complaint. Complainants have appealed.

The demurrer admits the truth of the facts charged in the bill of complaint. At this time, then, there is no necessity for discussing complainants' rights in the premises, and we assume that the waters upon which they were attempting to pursue, hunt, and capture wild fowl were navigable waters, where they were entitled to exercise all the rights they claim. We may also assume that the hired servants of defendant wrongfully and unlawfully, under the instructions of their employer, the defendant, by the means stated, interfered with complainants in the peaceable enjoyment of their rights, under the claim that defendant had acquired exclusive rights and privileges for its members to hunt wild fowl upon these waters, and that such interference will continue to the damage and injury of complainants. The only proposition to consider is whether the bill sets forth such a cause of action over which a court of equity will entertain jurisdiction, and whether the bill of complaint states facts and circumstances sufficient to entitle complainants to an injunction against defendant. It will be unnecessary to cite and discuss text-writers and authorities as to the fundamental principles which govern courts in issuing or denying relief by injunction. The first question in an injunction case, in addition to the general question on the threshold of every chancery case relative to jurisdiction, is as to the necessity for the restraining writ of the court. This is determined by ascertaining the nature of the injury done or threatened. This is strictly an injunction bill, and to deny an injunction, preliminary or permanent, disposes of the whole case.

If hunting for wild fowl upon these navigable waters for recreation or health is a right which the complainants are entitled to exercise, no person may lawfully interfere with the reasonable ond lawful exercise of that right. If it is urged that trespass will lie against defendant and its officers and agents for the wrong complained of, the repetition

and continuance of the interference with complainants would require a multiplicity of suits, and, if complainants must be relegated to such suits, they certainly would be absolutely deprived of the exercise of a legal and substantial right, and the damages possible to be obtained would be wholly inadequate. Parties in such cases should be entitled to equitable relief. Nashville, C. & St. L. Ry. v. McConnell (C. C.), 82 Fed. 65. The right upon which complainants insist is a civil right, and their protection in its exercise clearly within equitable jurisdiction. 22 Cyc. 757. We think that this right is not merely a bare legal right, and interference with it causes no substantial injury. To many people such rights are highly prized, and their exercise valuable and necessary. To hold that such rights are not of sufficient dignity that interference therewith, and the prevention of their lawful exercise, and threatened continuance of such interference, will be taken cognizance of by the courts, and injury arising therefrom prevented, would be to deprive complainants of such rights and to encourage wrongdoers in the assumption of the sovereign prerogative. The allegations of the bill of complaint as to the apprehended injury threatened by defendant are sufficient. The averments of the bill not being denied are sufficient if charged on information and belief. High on Injunction, § 35. From the state of the pleadings there is no dispute here as to complainants' rights. Whether there is an injury for which a suit at law will furnish no adequate remedy, and whether that injury is irreparable are the crucial questions. The first we have decided in the affirmative. Whether an injury to property or rights is irreparable depends in each case upon the nature of the right or property. "An injury, to be irreparable, need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages or when there exists no certain pecuniary standard for the measurement of damages * * * due to the nature of the right or property injured." 22 Cyc. 763, 764, and cases cited. The right to fish in navigable waters is a public right. 13 Am. Ency. 560, and cases cited. An action for damages will lie for injury to such right. 13 Am. & E. Enc. 584. The authorities hold that certain injuries to fishing, which, if permitted, would be irreparable, or for which the law furnishes no adequate remedy, may be restrained by injunction. 13 Am. & E. Enc. 585 and notes. To hunt and fish in and upon the navigable waters such as these is a public right of which any citizen may avail himself, subject to the game laws of the state. The right to hunt is as valuable to the individual as his right to fish, and the authorities which sustain and protect him in the exercise of the one may be invoked with equal force as to the other. We are unable to draw any distinction between them.

Our conclusion is that the injury to complainants' rights complained of comes within this definition.

The decree of the circuit court sustaining the demurrer and dismissing the bill is reversed, with costs of both courts to complainants. The cause will be remanded, and defendant allowed the time fixed by rule to answer said bill of complaint.

NOTE.—*Extent of the Public Right to Hunt and to Fish.*—With the population of the country growing denser, rights hitherto unquestioned or undisputed, such as the right to hunt and fish on the public domain, become in danger of impairment. They must, of course, be necessarily restricted, but cannot be absolutely denied.

Right to Fish.—Fish in streams and all public waters are ferae naturae, and, as far as any right of property in them can exist it is in the public, or is common to all until they are taken and reduced to actual possession. Percy Summer Club v. Welch, 66 N. H. 180; Lincoln v. Davis, 53 Mich. 375, 51 Am. Rep. 116; Gentile v. State, 29 Ind. 409; Parker v. People, 101 Ill. 581. Therefore, the right of fishing in the navigable and public waters is free to the citizens of the state. State v. Glenn, 52 N. C. 321; Hooker v. Cummings, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; Preble v. Brown, 47 Me. 284; Dunham v. Lamphere, 69 Mass. 268. This right of fishery in the navigable waters of the state is an incident of sovereignty and cannot be bartered away. Martin v. Waddell, 18 N. J. L. 496; Gough v. Bell, 21 N. J. Law, 156; Carson v. Blazer, 2 Bin. (Pa.) 475, 4 Am. Dec. 463; Sloan v. Biemiller, 34 Oh. St. 492; Skinner v. Hettrick, 73 N. Car. 53; Wilson v. Inloes, 6 Gill (Md.) 121. See recent case of State v. Gerbing (Fla.), 67 Cent. L. J. 179, where the court holds that the state cannot grant an exclusive right to plant oysters on navigable waters. The right of fishing in navigable waters is subordinate to the right of navigation (Lewis v. Keeling, 46 N. Car. 299, 62 Am. Dec. 168), but is paramount to the private right to cut grass below high water mark (Allen v. Allen, 19 R. I. 114, 32 Atl. 166, 30 L. R. A. 497), or the right to cut ice. Rowell v. Doyle, 131 Mass. 474. This right, however does not include the right to land fish on private property above high water mark (Bickel v. Polk), 5 Har. Del., 325), or to place weirs or obstructions on adjoining flats, or to erect a hut on private lands adjoining the fishery, (Cortelyou v. Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439) or to set nets or seines, making them fast in the usual way by grapplings to the shores, those being advantages which the riparian owner has over all others. Duncan v. Sylvester, 24 Me. 482, 41 Am. Dec. 400.

No right to exclusive fishing privileges in public waters can be obtained by adverse possession. Chalker v. Dickenson, 1 Conn. 382, 6 Am. Dec. 250; Sloan v. Biemiller, 34 Oh. St. 492; Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57.

Thus, a custom among the inhabitants on a certain river that when anyone had cleared a place for seine fishing, he might hold it against everyone else, is not a good custom, being in derogation of common right. Freary v. Cooke, 14 Mass. 488; Westfall v. Van Anker, 12 Johns. (N. Y.) 425. But see Trustees of Brookhaven v. Strong, 60 N. Y. 56; Collins v. Beubury, 27 N. C. 118.

In Sollers v. Sollers, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, 20 L. R. A. 94, it was held that where, in trespass, it appeared that the fish were taken in a cove covered by water, within the ebb and flow of the tide, being confined within the cove by a wire fence extending across its mouth, a requested prayer that the verdict must be for the plaintiff was properly rejected, even though plaintiff had caught and placed some of the fish within the cove, as the fish, though confined, were in the tide waters.

Right to Shoot Game.—As with fish, so with wild animals (ferae naturae) known as game, the ownership is in the state for the benefit of all the people in common. Geer v. State, 161 U. S. 519, 16 Sup. Ct. 600; Magner v. People, 97 Ill. 320.

Comparatively few authorities have passed on the right to hunt on the public domain or the liability for interference with such right. In Carrington v. Taylor, 11 East. 571, it was held that the firing at wild fowl by one who was at the time in a boat on a public river where the tide ebbed and flowed, so near an ancient decoy as to make the birds there take flight, was evidence of willful disturbance and of damage to the decoy for which an action on the case might be maintained by the owner. See also Keble v. Hickeringill, 11 Mod. 74, 130, 11 East 574.

JETSAM AND FLOTSAM.

UNQUALIFIED BACHELORS.

In these days of connubial recklessness and uncertainty it is difficult to determine the question of whether a man is married or single wholly from outward circumstances. For which reason we can excuse the attorney who drew up the following affidavit now on file on page 379, Record B, in the recorder of deeds' office, in the city of Wichita, Kansas, to which our attention has been called through the courtesy of our esteemed correspondent, Mr. E. L. Foulke.

State of Kansas,
Sedgwick County—ss.

R. P. Murdock being duly sworn says that the firm of Gilbert Brothers, was composed of A. W. Gilbert, D. W. Gilbert and Charles F. Gilbert; that Henry Gilbert and Mary, his wife, were the parents of A. W. and Charles F. Gilbert; that Charles F. Gilbert was June 14, 1871, a single man; that D. W. Gilbert died in California a single man; that A. W. Gilbert was a single man and further deponent sayeth that A. W. Gilbert, D. W. Gilbert and Charles F. Gilbert were never married and were not married June 14, 1871, or since that time; that they were bachelors; that A. W. Gilbert was single; that D. W. Gilbert was single; and that Charles F. Gilbert was single; that each and all were single June 14, 1871, before that time and since that time; that they were individually and collectively, absolutely and unqualifiedly bachelors.

R. P. MURDOCK.

Subscribed and sworn to, etc.

CORRESPONDENCE.

THE ANONYMOUS COMMENTARY ON LITTLETON.

When Mr. Hargrave was preparing his edition of Coke Littleton he found a MS. commentary on Littleton (Harleian MS. No. 1621.) He paid for copying it £12 10s. 4d. In 1829 Henry Cary published it, its date and the name o its author are unknown. It is a book showing great learning and having a style comparable with that of Blackstone. It seems strange that a book of such excellence and involving so much labor was not published by its author.

To me, for the following reasons, it seems probable that the book was written in 1624 by Sir John Davies.

On page 112 we read: "But if a forcible entry or a forcible detainer shall be made upon a lessee for years, whether the justice of the peace may make restriction and let them into their possessions again, is much questioned." As there could be no such question after the enactment of 21 Jac. 1. c. 15 on forcible entry, this page must have been written before that statute was enacted; while page 467 which refers to the statute of limitation (21 Jac. 1. c. 16) must have been written after that statute was enacted. The parliament 21 Jac. met in February 1624, and did not sit as late as the fall of 1624.

The preface (page XIV) shows that no commentary on Littleton had appeared. On the same page it is said: "And the king in his preface to his meditation upon the Lord's Prayer, doth remember that the author of that book titled 'The Trial', wisheth every man to abstain from writing any book when past fifty, which is a good caveat for myself." As the king (James I) died in March, 1625, and as Davies was born in 1570 my conjecture as to date and author is somewhat confirmed. Sir John Davies is the only man known to me of that period who possessed such learning and such style. Some pages of the remarks headed Littleton and prefixed to the commentary are taken from (and credited to) the preface to Sir John Davies' reports, throughout the commentary, the references to Sir John Davies' reports are quaint. Thus on page 34 at the end of a sentence translated from the report there is added. Sir John Davies' report, 34 a Nota Litt and on page 95 after a citation from those reports it is said: Read the book.

Sir John Davies was found dead in his bed December 8, 1626, by reason of apoplexy; within two years Coke Littleton had appeared and this rendered any other commentary superfluous.

The most interesting thing about the anonymous commentary, is the fact that the author used indiscriminately two editions of 7 Coke differently paged and two editions of 8 Coke differently paged. Citations of Coke reports have long been confusing because of the different paging of these two books in different

editions. If we call the paging of the Thomas and Fraser edition (of 1826) A, and that of the Wilson edition (of 1793) B, it will be found that 7 Coke part 2 begins with folio 1 in A, but in B the numbering of 7 Coke is continuous; and two pages in B correspond to one page in A, both in 7 Coke and 8 Coke. Thus Englefield's case is cited as 7 Coke 13 and 7 Coke 82. It is evident that Cary used a B edition of 7 Coke, but the author of the commentary used A and B indiscriminately. In Wilson's edition of 1793 the paging of which is B the table of cases and analytical index throughout correspond to A. Stephen in his dictionary of biography tells us that about 1624 there was an edition of 5, 7 and 8 Coke. The first part of each of these three books consists of a single case reported not in law French, but in English or in English and Latin. This was evidently done to reach a class of readers familiar (not with French) but with English or Latin, that is, the clergy; just as the last case of Sir John Davies' reports (case of praemunire) is in English. It is possible that the page may have been reduced in size to make the books easier to handle.

There is considerable legal learning in the commentary not to be found in Coke, as, for instance the statement that tenancy by the curtesy does not stretch into the Isle of Wight, though that be made parcel of the county of Southampton.

No doubt had it been thought that Sir John Davies wrote the commentary it would have been more highly prized.

C. B. SEYMOUR.

Louisville, Ky.

BOOK REVIEWS.

MOORE ON FACTS.

One of the most singular of legal treatises is one just prepared by Charles C. Moore, on the subject of Facts or the Weight and Value of Evidence.

Jeremy Bentham said that "the causes of trustworthiness and untrustworthiness in evidence will probably without much difficulty be acknowledged to be an interesting pursuit; interesting not merely as a field of speculation, but with a view to practice." The author of Moore on Facts has certainly given the profession a very interesting introduction to this important "field of speculation;" and, we believe, in spite of our misgivings when we first commenced our examination of this treatise, that the author has contributed something of considerable value by his researches into this new and wholly unexplained field.

It is true that much of this work is philosophical and a considerable number of the questions discussed are of academic interest only, having often very little relation to actual practice in the courts. It is no objection to a legal treatise that the author goes back to the great philosophers and thinkers of past ages for fundamental and axiomatic truths upon which to build the superstructure of a work designed to blaze a new path through the labyrinthine jungles of a multitude of unsystematized rules and maxims.

The author's purpose succinctly expressed is to correllate those rules of practice which determine for courts and juries the credibility of a witness or his testimony. "Physicists inform us," says the author, "that conductivities vary with varying temperatures, tension, torsion, or pressure, and they have carefully observed and recorded the various degrees of resistance. In like manner, wise triers of facts have recorded the results of judicial experiments, whereby the mind's conductivity of truth has been tested for the varying mental, moral, and physical conditions operating upon the observation or testimony of witnesses." And this is what the author has done for the entire profession. He has gathered at the expense of exhaustive research and immense toil, the opinions of judges and jurists on what their experiences have shown of the workings of the human mind on the witness stand under varying conditions and has arranged these rules accessibly and with what logic and symmetry of which such a subject would permit.

To give an idea of the wide scope of this treatise, there are long and exhaustive chapters on, "Observation," and "Memory," two subjects rarely treated in the ordinary text book on evidence. The 260-page Chapter on Memory collates over two thousand citations of judicial discussions of the faculty of memory from every conceivable standpoint. Not more than twenty of these cases, the author informs us, were ever cited before to the same propositions in any accessible text book or digest. We might mention a few other interesting chapter themes of this treatise as follows: "Degree of Proof"; "Uncontradicted Testimony"; "Incredibilities and Improbabilities"; "Sound and Hearing"; "Light and Sight"; "Taste, Smell and Touch"; "Distance"; "Speed"; "The Weather," etc.

Printed in two volumes in 1612 pages and published in two volumes by Edward Thompson Company, Northport, N. Y.

BOOKS RECEIVED.

Grounds and Rudiments of Law. By William T. Hughes, Author of "Contracts," "Procedure," and "Datum Posts of Jurisprudence." Volume II. Chicago. Published by The Usona Book Co. 1908. Price $4.50. Review will follow.

HUMOR OF THE LAW.

Judge Romulus M. Saunders, an angler and wag of the first water, told many different stories about the weight of a big catfish he had caught. A friend, trying to entrap him, said:

"Judge what was the weight of that big fish you caught?"

The judge, turning to his colored waiter, said:

"Bob, what did I say yesterday that catfish weighed?"

"What time yesterday, boss—in de mawning, at dinner time, or after supper?"

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Action**—Joinder of Causes.—A cause of action for cancellation of a release of damages for personal injuries and a cause of action for damages for such injuries may be joined in the same petition.—Perry v. M. O'Neil & Co., Ohio. 85 N. E. Rep. 41.

2. **Aliens**—Presumptions.—A person of Mongolian race coming from China is presumed to be an alien, and to rebut this presumption convincing evidence of citizenship is essential.—Ex parte Lung Wing Wun, U. S. D. C., N. D. Wash., 161 Fed. Rep. 211.

3. **Animals**—Stock Law Election.—A stock law election not held under Act 1900, p. 170, and annulled before the second was ordered within a year, held no bar to the second under section 3 (page 172) of that act.—Thornton v. Bramlett, Ala., 46 So. Rep. 577.

4. **Appeal and Error**—Devolutive Appeal.—A person to whom a devolutive appeal is granted in which the return day is fixed must not only file the transcript within the time fixed, but must also file the appeal bond within that time.—Tell v. Senac, La., 46 So. Rep. 618.

5.——Dismissal.—It is not ground for the dismissal of an appeal from an order making an allowance to an executor's attorney that the appellate court could grant appellants no relief.—In re Riviere's Estate, Cal., 96 Pac. Rep. 16.

6.——Matters Not Presented Below.—Reasons in support of a motion to direct a verdict which were not brought to the attention of the trial court will not be considered on appeal.—Yetter v. Gloucester Ferry Co., N. J., 69 Atl. Rep. 1079.

7.——Use in Evidence.—Admission of letter-press copies of letters held not prejudicial error for failure to give proper notice to produce the originals.—Burton v. Frank A. Seifert Plastic Relief Co., Va., 61 S. E. Rep. 933.

8. **Assault and Battery**—Evidence.—In a prosecution for assault with intent to do great bodily injury with a gun, proof that the gun was not loaded would be material on the question whether the accused intended to inflict an injury.—State v. Mitchel, Iowa, 116 N. W. Rep. 808.

9. **Bail**—Excessiveness.—Where petitioner was indicted for bribery, an order fixing bail at $10,000 on each charge, except as to certain reindictments, on which bail was fixed at $5,000 on each charge, was not excessive, except as to the reindictments, on which only nominal bail should have been required.—Ex parte Ruef, Cal., 96 Pac. Rep. 24.

10.——Liability of Surety.—Where a person signed as surety a bail bond, and it was accepted by the sheriff, the surety cannot avoid liability to the full extent of the bond because of agreement with the sheriff that his liability would be limited to a lesser amount.—Snowden v. State, Tex., 110 S. W. Rep. 442.

11. **Bankruptcy**—Claims.—The United States District Court held to have properly ordered in a bankruptcy proceeding that a creditor bank might account with the trustee for bonds of the bankrupt by delivering to the trustee notes of equal amount "made" or "indorsed" by bankrupt and discounted by the bank.—In re Waterloo Organ Co., U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 426.

12.——Enforcement of Attorney's Lien.—A court of bankruptcy will not, by a restraining order, interfere with the carrying into effect of a valid order of a state court based on a finding that attorneys for a bankrupt are entitled to a lien on a judgment recovered for him prior to the bankruptcy.—In re Pennell, U. S. D. C., D. N. J., 159 Fed. Rep. 500.

13.——Estoppel to Deny.—A bankrupt's wife held estopped to question the referee's jurisdiction to examine into her claim of title to personalty held to have vested in the trustee.—In re Bacon, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 424.

14.——Jurisdiction of Federal Court.—Where the property of a bankrupt resident of Georgia had been reduced to money in bankruptcy proceedings in the federal court sitting in that state, such court had jurisdiction to direct an allowance from the proceeds of the property sufficient to furnish him with household and kitchen furniture and provisions exempted under Const. Ga. art. 9, §§ 3-5.—In re Hargraves, U. S. D. C., S. D. Ga., 160 Fed. Rep. 758.

15.——Liens.—An adjudication in bankruptcy pending an attachment against the bankrupt operated as a seizure of the property by the bankruptcy court, so that, on appointment and qualification of a trustee, he acquired title and right to possession until the court awarded the property to whomsoever it belonged.—In re Walsh Bros., U. S. D. C., N. D. Iowa, 159 Fed. Rep. 560.

16.——Persons Subject to Adjudication.—A corporation engaged in operating a restaurant held not subject to a bankruptcy adjudication, under Bankr. Act, c. 541, authorizing an adjudication against corporations engaged in "manufacturing."—In re Wentworth Lunch Co., U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 413.

17.——Replevin.—Where a seller of property to a bankrupt brought replevin before the fil-

ing of a bankruptcy petition, claiming that the goods had been purchased through the bankrupt's fraud, the bankruptcy court had no jurisdiction to order the sheriff to surrender the goods to a receiver in bankruptcy, under Bankr. Act.—In re L. Rudnick & Co., U. S. C. C. of App., Second Circuit, 160 Fed. Rep. 903.

18.——Partnership.—Under Bankr. Act, c 541, §§ 5a, 5c, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), where a firm was insolvent, on dissolution, the duty devolved on the retiring member, as well as other members of the firm, to release a levy on firm property, a failure to do which justified a bankruptcy adjudication against the firm and its members, including the retiring partner.—Holmes v. Baker & Hamilton, U. S. C. C. of App., Ninth Circuit, 160 Fed. Rep. 922.

19.——Trustee's Accounts.—Summary order to a bankruptcy trustee to pay into the registry all moneys received by him as receiver in an action in a state court held improper.—Loveless v. Southern Grocer Co. U. S. C. C. of App., Fifth Circuit, 159 Fed. Rep. 415.

20. **Banks and Banking** — Surrender of Shares.—A stockholder in a national bank having elected to withdraw, that she retained her certificates pending an appraisal of the bank's assets, and that subsequent dividends were credited to her on her refusal to receive them, held immaterial.—Apsey v. Whittemore, Mass., 85 N. E. Rep. 91.

21. **Bills and Notes**—Accommodation Paper.—Where notes were indorsed as an accommodation and accepted by the payee to secure a debt, the notes are not taken out of the category of ordinary commercial paper.—Bank of Morgan City v. Herwig, La., 46 So. Rep. 611.

22. **Bridges**—Duty of Counties.—Counties and townships owe the same duty towards bridges on free macadam roads, respecting repairs, etc., that they owe towards other highway bridges.—American Steel Dredge Works v. Board of Com'rs of Putnam County, Ind., 85 N. E. Rep. 1.

23. **Brokers**—Compensation.—Where an owner puts his property into the hands of several real estate agents, the agent who first procures a purchaser is entitled to the commission.—Hennings v. Parsons, Va., 61 S. E. Rep. 866.

24.——Services After Termination of Contract.—Where real estate agents have failed to procure a purchaser within the time limited in their contract of employment, the owner held liable only for the value of services, not exceeding the contract price, performed in obtaining a purchaser after expiration of the contract.—Stewart v. Roberts, Ky., 110 S. W. Rep. 340.

25. **Cancellation of Instruments**—Mistake of Law.—A husband who deeded land to his wife under the mistaken impression that he would inherit her property in case she died childless held not entitled to a cancellation of the deed because of his mistake as to the law.—Powe v. Culver, Conn., 69 Atl. Rep. 1050.

26. **Carriers**—Carriage of Passenger.—In an action for the death of a passenger while riding on a caboose car, decedent held guilty of gross negligence in riding on top of the car.—McLean v. Atlantic Coast Line R. Co., S. C., 61 S. E. Rep. 900.

27.——Limitation of Liability.—The omission of a carrier to make inquiry as to the value of goods received is not a waiver of the provision in the contract limiting the liability to a specified sum.—Feld v. Platt, 110 N. Y. Supp. 1118.

28. **Chattel Mortgage**—Replevin.—In replevin by mortgagee of live stock and the increase thereof against an attaching creditor to recover possession of the increase, the burden is on mortgagee to establish that such increase was conceived before the mortgage was given.—Holt v. Lucas, Kan., 96 Pac. Rep. 30.

29. **Constitutional Law**—Foreign Corporations.—Foreign corporations, being within the state merely on sufferance, cannot complain of the procedure adopted by the state to determine the question whether their rights have been forfeited.—State v. Standard Oil Co., of Kentucky, Tenn., 110 S. W. Rep. 565.

30.——Liberty to Contract.—Laws Nev. 1903, p. 207, c. 111, § 1, prohibiting employers from contracting with employees that they shall or shall not become or continue members of a labor organization, is unconstitutional and void, as depriving parties affected of the liberty to contract.—Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, U. S. C. C., D. Nev., 159 Fed. Rep. 500.

31.——Right to Raise Constitutional Questions.—An alien has no right to require the courts of the United States to adjudicate questions as to the constitutionality of laws enacted by Congress.—Ex parte Lum Wing Wun, U. S. D. C., W. D. Wash., 161 Fed. Rep. 211.

32. **Contracts** — Right to Recant.—Where both parties intended that a building contract should be in writing and the contractor submitted plans, with a contract in writing signed by himself, and the owner never signed the instrument, the contract was incomplete.—Barrelli v. Wehrli, La., 46 So. Rep. 620.

33. **Convicts**—Conveyances.—A sentence to the penitentiary for a term of years does not make void a conveyance executed by the convict before his imprisonment, and while execution of the judgment of conviction is stayed under Sess. Laws 1903, p. 504, c. 389, pending appeal.—Harmon v. Bower, Kan., 96 Pac. Rep. 51.

34. **Corporations**—Mortgage of Assets to Pay for Stock.—Persons purchasing the capital stock of a corporation have no power to mortgage the assets of the company to pay their individual debt for the stock.—Hess v. Reick, N. J., 69 Atl. Rep. 1090.

35. **Corporations**—Ultra Vires Contracts.—The purpose of a grant of corporate power is that the corporation shall exercise its powers and carry on its business through its own officers and agents, and an agreement by which it surrenders the management and control of its affairs and business to another corporation organized for a wholly different purpose and carrying on a different business is ultra vires.—Holt v. California Development Co., U. S. C. C. of App., Ninth Circuit, 161 Fed. Rep. 3.

36. **Creditors' Suit**—Validity of Judgment.—The rule that a third person may impeach a judgment when it is sought to be used to his detriment does not apply where it is only sought to compel payment from money alleged to equitably belong to the judgment debtor.—Feidler v. Bartleson, U. S. C. C. of App., Ninth Circuit, 161 Fed. Rep. 30.

37. **Criminal Evidence**—Judgment of Conviction.—A judgment of conviction by a justice of

the peace who has no final jurisdiction being void, no appellate jurisdiction can be given to the city court by an appeal therefrom.—Martin v. State, Ala., 47 So. Rep. 104.

38. **Criminal Law**—Effect of Probation.—An offender placed on probation on objecting to further continuance held not entitled to complain if he was thereupon discharged, but was entitled to appeal if sentence was imposed.—Marks v. Wentworth, Mass., 85 N. E. Rep. 81.

39.——Pleadings.—Judgment will not be arrested because it was alleged in the complaint that defendant kept a place where intoxicating liquors "were and are" sold, and where persons "were and are" permitted to resort for the purpose of drinking.—City of Ft. Scott v. Dunkerton, Kan., 96 Pac. Rep. 50.

40. **Criminal Trial**—Constitutional Questions. —Where the record shows that accused moved in arrest of judgment, on the ground that the statute on which the prosecution was based was unconstitutional, the court will consider that question, though it is not shown that the trial court acted on the motion.—State v. Davis, La., 46 So. Rep. 673.

41.——Failure to Allow Continuance.—Discretion of court was not exceeded by compelling accused to go to trial where the case had been postponed several times, and nothing had been heard from the counsel for the defendant.—State v. Clay, La., 46 So. Rep. 616.

42. **Damages**—Breach of Contract.—At common law the breach of a contract is per se a legal injury from which some damage will be inferred, and, in the absence of proof of actual damage, plaintiff is entitled to nominal damages.—Van Schoick v. Van Schoick, N. J., 69 Atl. Rep. 1080.

43. **Descent and Distribution**—Conveyances.—On the death of a vendor, before conveyance his heir takes the title in trust for the vendee, but the purchase money when paid, goes to the vendor's personal representative.—Flomerfelt v. Siglin, Ala., 47 So. Rep. 106.

44. **Dower**—Lien.—Creditors of an estate are entitled to be represented in the allotment of dower, or the ascertaining of a sum in lieu thereof, unless there are no debts, or there is sufficient, personal property to pay the same.—Flomerfelt v. Siglin, Ala., 47 So. Rep. 106.

45. **Drain**—Parties to Drainage Proceedings. —A political subdivision having the ownership or quasi ownership of a bridge or highway affected by the establishment of a public drain held a necessary party to the drainage proceedings.—American Steel Dredge Works v. Board of Com'rs of Putnam County, Ind., 85 N. E. Rep. 1.

46. **Embracery**—Attempt to Corrupt Juror.—An offer to bring a juror certain trade held a promise of a gratuity, within the meaning of Cr. Code 1902, § 263, providing punishment for attempting to corrupt jurors.—State v. Maddox, S. C., 61 S. E. Rep. 964.

47. **Eminent Domain**—Closing of Alleys.—On the closing of an alley, the abutting owners are entitled to the difference in the market value of the property with the alley open and its market value with the alley closed.—Henderson v. City of Lexington, Ky., 111 S. W. Rep. 318.

48. **Evidence**—Best and Secondary. — The question of reasonable notice to produce original letters to make letterpress copies admissible is a relative one, and, in the absence of statutory requirement, depends upon the circumstances of each case.—Burton v. Frank A. Seifert Plastic Relief Co., Va., 61 S. E. Rep. 933.

49.——Mortality Tables.—A mortality table printed in a law book is not admissible in evidence, where it is not shown to have been in actual use or to have acquired a reputation for accuracy.—Notto v. Atlantic City R. Co., N. J., 69 Atl. Rep. 968.

50. **Executors and Administrators**—Equitable Conversion.—Where a widow, who was also administratrix, sued in both capacities to enforce an equitable conversion, her further claim to dower out of the proceeds was an antagonistic position requiring the appointment of an administrator ad litem for the estate under Civ. Code 1896, § 352.—Flomerfelt v. Siglin, Ala., 47 So. Rep. 106.

51. **False Pretenses**—Elements of Offense.—If in obtaining a loan from a bank the borrower secured it upon a forged signature on a note, a fraud is practiced on the bank, and the person obtaining the loan is liable for a prosecution for obtaining money under false pretenses. —Day v. Commonwealth, Ky., 110 S. W. Rep. 417.

52. **Federal Courts**—Jurisdiction.—Whether a non-resident is entitled to maintain an action for wrongful death under a state statute is a question which goes to the defense of such an action, and does not affect the jurisdiction of a federal court therein.—Pennsylvania v. Scofield, U. S. C. C. of App., Third Circuit, 161 Fed. Rep. 911.

53. **Fire Insurance**—Authority to Waive.—If the company's agent was more than a mere soliciting agent in issuing the policy, and had further powers, knowledge of the agent that insured kept no iron safe or books, as required by the policy, was knowledge by the company, though the agent did not communicate such facts to the company.—Plunkett v. Piedmont Mut. Ins. Co., S. C., 61 S. E. Rep. 893.

54. **Fish**—Riparian Rights.—An owner or claimant of lands in Alaska which border on navigable waters, having no right to the shore lands, has no exclusive right of fishing in such waters, nor to erect and maintain a fish trap either on the shore between high and low water mark, or in the adjacent deep waters to the exclusion of others.—Columbia Canning Co. v. Hampton, U. S. C. C. of App., Ninth Circuit, 161 Fed. Rep. 60.

55. **Fraudulent Conveyances**—Fraudulent Interest.—To set aside gifts as fraudulent against creditors at the time of the gift, it is not necessary to show that the gifts were made with a fraudulent intent, but, to set aside gifts as fraudulent against subsequent creditors, it is necessary to show a fraudulent intent.—Cartwright v. West, Ala., 47 So. Rep. 93.

56. **Garnishment**—Amendment of Return.—Any amendment of the return of service of a garnishment summons which makes it speak the truth may be made, and it relates back to the date of service.—Southern Express Co. v. National Bank of Tifton, Ga., 61 S. E. Rep. 857.

57. **Grand Jury**—Interpreters.—An interpreter summoned by the grand jury is not disqualified to serve by being called as a witness to the facts under investigation, nor by reason of his being a deputy sheriff and taking an active part in the effort to discover the author of the

supposed crime under consideration.—State v. Firmatura, La., 46 So. Rep. 691.

58. **Guaranty**—Amount Recoverable.—Interest is recoverable against a guarantor from the time the debt became due and after demand and notice, although the effect is to increase the judgment beyond the limit fixed by the contract of guaranty.—Johnson v. Charles D. Norton Co., U. S. C. C. of App., Sixth Circuit, 159 Fed. Rep. 361.

59. **Guardian and Ward**—Settlement.—Where the mother of minor heirs, in proceeding for partition, purchased the property under such circumstances as to hold it in trust for them, the burden was upon her to show that, by her discharge as general guardian of the minor heirs, she was released from accounting for the proceeds of such property.—Merkley v. Camden Safe Deposit & Trust Co., N. J., 69 Atl. Rep. 1100.

60. **Highways**—Establishments.—By continuous adverse use for 20 years, the public may acquire a prescriptive right to a road over any land which is subject to the state's right to lay out a road over it.—State v. Washington, S. C., 61 S. E. Rep. 896.

61. **Homestead**—Exemptions.—Where a husband and wife owned adjoining tracts of land, cultivated as one farm, the fact that their dwelling house is located upon the wife's part of the land does not deprive the husband of the right to homestead exemption out of the part owned by him.—Mann Bros. v. Jenkins, Ky., 110 S. W. Rep. 387.

62. **Homicide**—Provocation.—If one provokes a difficulty in order to have a pretext to kill another or inflict serious bodily injury upon him, he cannot justify such killing on the ground of self-defense, although it may subsequently be necessary for him to kill his adversary in order to save his own life.—Young v. State, Tex., 110 S. W. Rep. 445.

63. **Husband and Wife**—Injury to Intended Wife.—No action lies by a husband against a person who has committed a tort on the woman whom the plaintiff was engaged to marry at the time, and whom he subsequently marries.—Mead v. Baum, N. J., 69 Atl. Rep. 962.

64. **Injunction**—Labor Unions.—Workmen free from contract obligation have a legal right, singly or as a union, to strike and use any means not inconsistent with rights of others, provided no persuasion used of such a character as to leave the person solicited free to do as he pleases.—Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, U. S. C. C., D. Nev., 159 Fed. Rep. 500.

65. **Intoxicating Liquors**—Justification of Sale Without License.—The refusal of the officers of a city to hear an application for and to issue a liquor license in accordance with an ordinance prohibiting the sale of intoxicating liquors without a license and prescribing the procedure for a license held no defense to a prosecution for a sale of liquor without a license.—City of Montpelier v. Mills, Ind., 85 N. E. Rep. 6.

66.——Indictment.—In an indictment for selling intoxicating liquors without a license, it is not necessary to allege the time of the commission of the offense; time not being of the essence of the offense charged.—State v. Conega, La., 46 So. Rep. 614.

67. **Landlord and Tenant**—Leases.—A lessee of a city held liable under a renewal of all taxes, the resolution for renewal recited therein, providing that it shall be according to the terms of the original lease, and the change in terms being an unauthorized one by the draftsman.—City of Norfolk v. White, Va., 61 S. E. Rep. 870.

68. **Libel and Slander**—Special Damage.—To charge a physician with having stolen the land of a certain person does not charge a slander with reference to his profession, so as to be actionable without an allegation of special damage.—Jones v. Bush, Ga., 62 S. E. Rep. 279.

69. **Mandamus**—Adaquacy of Other Remedies.—Mandamus held not to lie to compel a justice of the peace to discharge a garnishee, there being an adequate remedy by appeal under Civ Code 1896, § 2185, or by certiorari.—Tillman v. State, Ala., 46 So. Rep. 586.

70.——Corporations.—Where membership in a corporation depended on continuance of the members in the business of retail grocerymen, mandamus will not lie to reinstate an expelled member, where at the time of the trial he was ineligible.—Ziegenheim v. Baltimore Wholesale Grocery Co., Md., 69 Atl. Rep 1071.

71. **Master and Servant**—Assumed Risk.—Plaintiff, who had been employed at certain work for a year, held to have had enough experience in the work and a knowledge of the use of the appliances with which he worked to charge him with the assumption of risk.—Stitzel v. A. Wilhelm Co., Pa., 69 Atl. Rep. 996.

72.——Assumed Risk.—When there is a safe and an unsafe way of executing an order, the employee who knows the difference, but adopts the unsafe way, assumes the risk.—Taylor v. Rock Island, A. & L. R. Co., La., 46 So. Rep. 621.

73.——Contract of Employment.—The refusal of a servant to obey an order of the master does not afford legal ground for his discharge unless such order was reasonable, and that question is one of fact for the jury, although the contract is in writing and requires him to perform such services as the master may direct, and the order is also in writing.—Development Co. of America v. King, U. S. C. C. of App., Second Circuit, 161 Fed. Rep. 91.

74.——Injuries to Servants.—The mere fact that an experienced employee engaged in operating a metal stamping press, knew that, if his hand was under the die when he put his foot upon a treadle which released the die, his hand would be crushed, would not relieve the master from liability.—Clemens v. Gem Fibre Package Co., Mich., 117 N. W. Rep. 187.

75. **Mines and Minerals**—Deeds.—Where a deed conveyed a certain coal bed, subsequent phrases that it was located "on Lackawanna Creek," on "Lot No. 1," "occupied by W.," merely identified the thing conveyed, and did not divide or define its extent.—Delaware, L. & W. R. Co. v. Gleason, U. S. C. C. of App., Third Circuit, 159 Fed. Rep. 383.

76. **Mortgages**—Notice of Prior Deed.—In an action to foreclose a mortgage defended by a subsequent grantee, claiming under a deed executed before, but recorded after the mortgage, on the ground that limitations had run against him, the burden was on plaintiff to show his want of notice of the deed.—Hibernia Savings & Loan Soc. v. Farnham, Cal., 96 Pac. Rep. 9.

77. **Municipal Corporations—Actions.**—Service of notice on a writ of certiorari and of the hearing cannot be had on a municipality by service on the solicitor general of the judicial circuit wherein the municipality is located.—Smith v. City of Washington, Ga., 61 S. E. Rep. 923.

78. **Municipal Corporations—Appointment of Officers.**—When the appointing power considers such proof of competency as is furnished by the applicant with such personal knowledge as may be possessed and information as may be acquired, the decision as to the competency is final.—State v. Addison, Kan., 96 Pac. Rep. 66.

79. **Negligence**—Contributory Negligence.—It is not necessary, in order to render the negligence of a person the proximate cause of an injury, that he be guilty of some active, affirmative negligence; passive negligence being sufficient if it is the direct cause of the injury.—McLean v. Atlantic Coast Line R. Co., S. C., 61 S. E. Rep. 900.

80.——Dangerous Premises.—A person walking in the aisle of a department store is not required to exercise the same degree of caution in looking to obstructions on the floor as if he were walking on the highway.—Bloomer v. Snellenburg, Pa., 69 Atl. Rep. 1124.

81.——Pleading.—The rule that plaintiff shall not state one cause of action in his petition and recover upon another has no application where the specific negligence proved is within the scope of negligence pleaded generally in the petition.—Knight v. Donnelly, Mo., 110 S. W. Rep. 687.

82. **Nuisance**—Personal Discomfort.—Where by the unlawful acts of defendant in operating a tallow plant the air which plaintiff and his family were compelled to breathe was polluted, plaintiff could recover for the personal discomfort resulting from the nuisance.—Labasse v Piat, La., 46 So. Rep. 665.

83. **Partition—Parties.**—A grantee of an easement in lands by two of three tenants in common held a necessary party to a suit for partition, and entitled to have a decree taken without notice to it opened and its rights considered.—Jeter v. Knight, S. C., 62 S. E. Rep. 259.

84. **Partnership**—Attorney's Fees on Firm Note.—A partner who, without suit, pays a note containing a stipulation for attorney's fees in case of suit, has no right in the settlement of the partnership to recover such fees.—Borah & Landen v. O'Neill, La., 46 So. Rep. 788.

85. **Perpetuities**—Computation of Period.—At common law, under a general power giving the donee the right to appoint at his pleasure the period of suspension of the power of alienation was computed from the time of the exercise of power.—Farmers' Loan & Trust Co. v. Kip, N. Y., 85 N. E. Rep. 59.

86. **Pleading**—Allegations Admitted by Failure to Deny.—Where the allegations in an action on a note, with respect to attorney's fees, were not denied, they were facitly admitted to be true, and a judgment was properly entered for attorney's fees, though there was no evidence on that subject.—Jester v. Bainbridge State Bank, Ga., 61 S. E. Rep. 926.

87. **Post Office**—Action on Bond.—The government's moral obligation to pay over to senders or addressees of stolen mail the amount recovered on the bonds of the defaulting clerks is sufficient to enable the government to maintain an action on the bonds.—United States v. American Surety Co. of New York, U. S. C. C., D. Md., 161 Fed. Rep. 149.

88. **Principal and Agent**—Authority of Agent.—Authority to an agent to purchase goods does not authorize him to subsequently admit the correctness of the account therefor so as to render his principal liable for the price of an account stated.—Moore v. Maxwell & Delhomme, Ala., 46 So. Rep. 755.

89. **Prohibition**—Parties Defendant—A writ of prohibition will not lie against the executive committee of a political party to prohibit it from recanvassing returns of a primary election.—Kump v. McDonald, W. Va., 61 S. E. Rep. 909.

90. **Railroads**—Duty of Pedestrians.—Where the distance across four railroad tracks is only 49 feet, a traveler about to cross exercises due care if he stops, looks, and listens before venturing on the first track.—Cherry v. Louisiana & A. Ry. Co., La., 46 So. Rep. 596.

91.——Fences.—A railroad company held not negligent, in the absence of statute, in failing to erect fences or barriers to keep children from trespassing on its tracks.—New York Cent. & H. R. R. Co. v. Price, U. S. C. C. of App., First Circuit, 159 Fed. Rep. 330.

92.——Injury to Deaf Person on Track.—There can be no presumption that a deaf person struck and killed by a wild engine while crossing a railroad track at a street crossing was in the exercise of due care.—Shum's Adm'x v. Rutland R. Co., Vt., 69 Atl. Rep. 945.

93. **Rape**—Evidence.—Carnal knowledge includes carnal abuse, as used in Gen. St. 1902, sec. 1148, directed against one who shall carnally know and abuse a female under 16, and to "abuse" is not to injure the genital organs of the female.—State v. Sebastian, Conn., 69 Atl. Rep. 1054.

94. **Release**—Authority to Release.—Release of underwriters primarily liable for the delay in salvage of certain vessels held a valid defense to the underwriter's claim to set off such damages against their liability under the contract for salvage.—Klauck v. Federal Ins. Co., 111 N. Y. Supp. 1037.

95. **Release**—Questions for Jury.—Where defendant pleaded a release in an action for breach of contract, evidence that plaintiff was unable to read or write English, and that he signed the release under the belief that it was a receipt for money paid, held admissible.—Cohen v. Schreiber, 111 N. Y. Supp. 702.

96. **Religious Societies**—Title to Property.—The title of the Roman Catholic Church in Porto Rico to temples dedicated to religious uses held not affected by the fact that some of the funds for building the same were public funds appropriated by the municipality of Ponce, where such appropriations were made without reservation or restriction.—Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico, U. S. S. C., 28 Sup. Ct. Rep 737.

97. **Removal of Causes**—Diversity of Citizenship.—Where a petition for removal for diversity of citizenship was filed by one defendant alone and neither petition nor the record showed that the other defendant was a mere nominal or formal party, the petition was fatally defective.—Santa Clara County v. Goldy Mach. Co., U. S. C. C., N. D. Cal., 159 Fed. Rep. 750.

98. **Sales**—Conditional Sales.—On a breach of contract for the payment of a beet pulp drier, in dried pulp the seller having retained title to the drier until paid for, it was entitled to recover possession of the drier and also damages for breach of contract or for the balance of the price unpaid in money.—Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co., U. S. C. C., W. D. N. Y., 161 Fed. Rep. 215.

99.——Evidence.—In an action for the price of goods, it was not essential that the order therefor be signed by the buyer to be admissible in evidence, where the seller's representative testified that it was the original order.—Butler v. Ederheimer, Fla., 47 So. Rep. 23.

100. **States**—Premature Sale of Municipal Warrants.—Where the State Treasurer having custody of a municipal warranty sells it without authority before funds have been raised for its redemption, and becomes liable for its conversion, the measure of damages to the state does not necessarily include interest up to the time of its payment.—State v. Kelly, Kan., 96 Pac. Rep. 40.

101. **Street Railroads**—Competency of Employees.—Employment of motorman under 21 held to put on the employer the burden to show his competency.—Cloud v. Alexandria Electric Rys. Co., La., 46 So. Rep. 1017.

102.——Failure to Give Transfer.—Where a person entered a street car to go to a designated place and paid the fare, and the company was obliged to carry her to the designated place and give her a transfer to enable her so to do, the refusal to give a transfer was a refusal to carry her to her destination.—South Covington & C. St. Ry. Co. v. Quinn, Ky., 110 S. W. Rep. 404.

103.——Injury to Child.—Street railroad held liable where motorman fails to stop car on seeing child in danger.—Taterewicz v. United Traction Co., Pa., 69 Atl. Rep. 995.

104. **Sunday**—Labor.—To keep open, manage, and superintend a theater and sell tickets therein on Sunday is "labor," within the meaning of Sunday ordinance.—City of Topeka v. Crawford, Kan., 96 Pac. Rep. 862.

105. **Taxation**—National Banks.—That the value of the shares of a national bank includes value due to non-taxable United States bonds owned by the bank is no objection to the validity of an assessment of such shares for taxation by a state without excluding the value of the bonds.—Hager v. American Nat. Bank, U. S. C. C. of App., Sixth Circuit, 159 Fed. Rep. 396.

106. **Telegraphs and Telephones**—Negligence.—It is not essential that the particular loss due to negligence in the transmission of a telegram should have been contemplated to render the telegraph company liable.—Western Union Telegraph Co. v. Merritt, Fla., 46 So. Rep. 1024.

107. **Territories**—Scope of Local Legislation.—General prohibitions in Act July 30, c. 818, 886, 24 Stat. 170, against territorial legislation by local or special laws, do not apply where specific permission to the contrary is granted by the organic act of a particular territory.—Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico, U. S. S. C., 28 Sup. Ct. Rep. 737.

108. **Torts**—Joint and Several Liability.—Where separate acts of negligence of two parties are the direct cause of a single injury, and it is impossible to determine in what proportion each contributed to the injury, each is responsible for the whole injury.—Goldstein v. Tunick, 110 N. Y. Supp. 905.

109. **Towns**—Change of Members of Board.—Where the membership of a town advisory board changed pending a suit against the board, the old members had no standing in court beyond the right to call the court's attention to their substitution.—Advisory Board of Harrison Tp. v. State, Ind., 85 N. E. Rep. 18.

110. **Trial**—Instructions.—That the trial judge, in an action for injuries to a servant, used the term "ordinary care" in his charge, instead of "ordinary care and diligence," and did not use the expression "skill and diligence," held not to require a reversal, where the jury were not misled.—Atlanta, K. & N. Ry. Co. v. Tilson, Ga., 62 S. E. Rep. 281.

111.——Settlement of School Lands.—Though on adverse claims to school land the findings do not state which one of the several claimants first settled thereon a judgment against one of them necessarily determines the fact of whether he made the first settlement against him where it is essential to support the judgment.—Christisen v. Bartlett, Kan., 95 Pac. Rep. 1130.

112. **Trusts** — Constructive Trusts.—Where two persons contract with each other to purchase stock and divided the stock acquired and the expense incurred, and one of the parties having purchased stock refuses to carry out the contract, equity will hold him a trustee ex maleficto and will enforce the trust.—Sherman v. Herr, Pa., 69 Atl. Rep. 899.

113. **Vendor and Purchaser** — Annuity.—An owner may sell his property payable in installments at long intervals and thereby transfer a valid title, though the purpose may be to provide for an annuity.—Rudolf v. Gerdy, La., 46 So. Rep. 598.

114. **Waters and Water Courses**—Private Fire Protection.—That a municipal regulation respecting water taken from a city's mains for private fire protection has been put in force gradually held no ground for enjoining its enforcement in a particular case.—Shaw Stocking Co. v. City of Lowell, Mass., 85 N. E. Rep. 90.

115.——Water Companies.—A water company under a franchise from a city and under its contract with it held under a public duty to furnish to the inhabitants for domestic use a supply of water at fixed tolls, and for a breach of this duty it is liable in damages to a citizen.—Macon Gaslight & Water Co. v. Freeman, Ga., 61 S. E. Rep. 884.

116. **Wills**—Construction.—Before the personal estate of a decedent is relieved from the payment of debts, legacies, and expenses of settling the estate, it must clearly appear that the testator intended that it should be.—Martin v. Andrews, 111 N. Y. Supp. 40.

117.——Construction.—A residuary clause in a will providing for a sale on the death of the survivor of testator's intended wife or his daughter M. held not to indicate that a remainder to his children was contingent.—Trowbridge v. Coss, 110 N. Y. Supp. 1108.

118.——Validity.—A husband interested in the personal property of testatrix, and her sister, an heir at law in her real estate, may sue to determine the invalidity of the will, under Code Civ. Proc. § 2653a.—Wood v. Ragan, 110 N. Y. Supp. 938.

119. **Witness**—Cross-Examination.—Where a witness for the state testified that she did not know that defendant had ever whipped her, it was not error to allow the prosecuting attorney, after stating that he was surprised by the testimony, to ask the witness if she did not tell him in the jury room the day before that defendant had beaten her a number of times.—Washington v. State, Ala., 46 So. Rep. 778.

120.——Impeachment.—That prosecutor is bail for witness testifying against defendant is relevant on the question of the witness' credibility.—Bates v. State, Ga., 61 S. E. Rep. 888.

121.——Re-examination.—Under the federal practice, permitting the re-examination of witnesses in a criminal case with respect to matters not brought out in cross-examination, is within the discretion of the trial court.—Jacobs v. United States, U.S. C. C. of App., First Circuit, 161 Fed. Rep. 694.

122.——Refreshing Memory.—Though the memory of a witness needs refreshing, it is not proper to read to the jury the contents of a memorandum made by him.—Berkowsky v. New York City Ry. Co., 111 N. Y. Supp. 989.

123.——Impeaching Testimony.—Testimony as to a statement made by a person injured immediately after the injury, and while he is in severe pain, blaming himself in a general way for the accident, is not entitled to great weight, as impeaching testimony in respect to the facts which is thoroughly reliable.—The Ocracoke, U. S. D. C., E. D. Va., 159 Fed. Rep. 552.